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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Docket No.

MARTYN C. MERRITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

==========

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court in sentencing a defendant pursuant to a plea agreement may draw adverse inferences against the defendant for his refusal at such sentencing proceedings to provide information which would incriminate him as to other as yet unfiled criminal charges arising from the same pattern of conduct, and, whether once this defendant raises the Fifth Amendment privilege as grounds for his refusal to do so, the court may then penalize the defendant by a severe upward adjustment of his sentence.

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IN THE
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OCTOBER TERM, 1992

Docket No.

MARTYN C. MERRITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Martin C. Merritt respectfully requests that a *Writ of Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming the Petitioner's sentence imposed

including upward departure of the sentence subsequent to Petitioner's plea of guilty, pursuant to a plea agreement and resulting from several hearings held thereupon.

The offense to which Petitioner pled guilty and for which he was sentenced was a one count violation of 18 U.S.C. §371, conspiracy to defraud the United States.

OPINION BELOW

The opinion of the Unites States Court of Appeals for the Second Circuit in slip opinion is reproduced in the appendix hereto at Petitioner's Appendix 1a to 37a. The opinion is found at _____ F.2d _____ (2d Cir. 1993) and no petition for rehearing was filed relating thereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. The United States Court of Appeals for the Second Circuit affirmed all provisions of Petitioner's sentence on February 9, 1993, and this petition is timely filed within ninety (90) days thereafter.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides that no person subject to the laws of the United States shall be compelled to give self-incriminatory testimony:

> "[n]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Petitioner, who was charged in November, 1990 by a twelve count indictment filed in the Southern District of New York, elected to plead guilty to one count of violating 18 U.S.C. §371., conspiring to defraud the United States, specifically, the Agency for International Development (AID). Pursuant to the to the plea agreement, the stipulated base offense level was 17 and Petitioner agreed to make available prior to sentencing, "all personal and corporate financial information requested by the government."

On May 31, 1991, Petitioner entered his plea of guilty to the single 18 U.S.C. §371 count pursuant to the plea agreement. Subsequent thereto, the District Judge held a further hearing on the issue of restitution.

A major issue at such hearing was whether Petitioner controlled a particular account at Banque Worms in London and the funds therein, such funds having been therein deposited from a Xanthus Corporation account at Exchange National Bank of Chicago.

At issue also was an entity known as Broadview Development Corporation, an Isle of Jersey (U.K.) company which held title to Petitioner's residence at 87 Broadview Avenue, New Rochelle, New York, but in which Petitioner claimed he had no financial interest.

As reflected in the Second Circuit Opinion, Petitioner's Probation Officer noted that despite Petitioner's "alleged sale to Broadview" of his residence, Petitioner continued to deduct property taxes and mortgage interest regarding the Broadview property.

At the September 26, 1991 hearing, one Irwin Shustak, Esq., who acted as Assistant Secretary for Broadview Development, Ltd. (the Jersey Company), testified that a "foreign tax was paid to the Internal Revenue Service (IRS)" because the seller (Broadview) was a foreign corporation." Mr. Shustak also testified that he delivered certain checks to Petitioner's spouse, Mary Anne Merritt that were "closing proceeds." payable to Broadview.

Since the issue at this September 1991 hearing was both a.) a possible upward adjustment to Petitioner's sentence (based on his alleged possible obstruction of justice for continuing to retain the proceeds of the crime). and b.) a possible lack of a two point credit for "acceptance of responsibility", Petitioner's "willingness to come forward became critical.

At this stage of the sentencing hearing, the court below stated to Petitioner's counsel:

> ...I think in fairness [to Petitioner's counsel] I should let you know that as I view the record, certainly, were this a jury trial, I would be instructing the jury on the uncalled witness. I do not have that memorized, but it says in substance: if there is a person who has relevant evidence who is available to only one side, then you may infer if the evidence is not presented that the testimony would be unfavorable.
>
> I view Mrs. Merritt as certainly falling within that framework of the principle and think that on this record since her name is all over the critical records and since the matter of privilege prevents her from being called by the government, but is no obstacle to her being called by the defense, that I may in these circumstances draw an in inference against your client from the failure to call her."

At this juncture Petitioner's counsel argued that he had submitted a brief to the Court the previous day addressing Petitioner's Fifth Amendment rights upon

these issues, and that "[m]any of those concerns are equally applicable to Mrs. Merritt. She was a target of the grand jury.

A subsequent hearing was held by the lower court on October 10, 1991, during which Petitioner's Probation Officer testified that he had "various consultations with the Internal Revenue Special Agents" regarding the propriety of Petitioner's tax return deductions for mortgages and interest payments." In testifying, Petitioner's Probation Officer noted that Petitioner had denied to him any financial interest in Broadview Development, Ltd. and "[t]hen I saw [Petitioner's] tax returns that indicated otherwise."

When Petitioner's counsel pointed out to the Court that no substantial evidence had been presented by the government to show Petitioner's ownership

of Broadview, the Court stated:

> "I've considered those arguments. I note that there is no sworn testimony by your client to that effect...Do you want him to testify?"

In response to which Petitioner's counsel stated as follows:

> "...you are inviting him [Petitioner] to waive his constitutional right in the that regard and then you are penalizing him for not doing it."

Clearly, during all of this testimony, as well as that taken at the preceding hearing, it was clear that on the facial issues of restitution, acceptance of responsibility, and upward adjustments for obstruction of justice, Petitioner stood in serious risk of other criminal charges of tax evasion and money laundering if his "truthful testimony" would have shown he had any interest and/or control of the Banque Worms account or Broadview Development, Ltd.

On these issues, not only was his wife 's risk the same on similar, but her potential testimony on these potential on these issues was shielded by the spousal privilege.

Subsequently, the as set forth in the decision of the Second Circuit "[T]he trial court emphasized that Petitioner's obstruction of justice had continued well after his plea of guilty," and Petitioner was given a two point upward adjustment for obstruction of justice, given no credit for acceptance of responsibility and was given a one point upward adjustment for danger to public health. Finally, pursuant to §5K2.0 Petitioner was departed upward to the statutory maximum of sixty (60) months because "of his continued fraudulent scheme to retain the proceeds of his crime."

On appeal, Petitioner urged the Second Circuit that his Fifth Amendment privilege was trammelled upon, and urged the appellate Court that the trial judge insisted Petitioner provide a "link in the chain of evidence to prosecute [Petitioner] for money laundering or tax evasion."

The Second Circuit either misperceived this argument or chose not to address it, for in facing Petitioner's Fifth Amendment arguments, the Court made no mention of the exposure of Petitioner to either money laundering or tax evasion charges, had he chosen to testify at his sentencing hearings.

REASON FOR GRANTING WRIT

This petition rests upon a principle of common law jurisprudence more sacred than the Magna Carta and directly resultant from the excesses of the Star Chamber the fundamental principle that unlike the proceedings known to the Inquisition, one cannot under any circumstances be compelled to testify against himself or herself.

This point was driven home by an obscure young lawyer named Francis Scott Key in his representation of Vice President Aaron Burr before the designated presiding judge, Chief Justice John Marshall. In this regard, we find language drawn directly from *United States v. Burr*, (C.C.Va.) F. Case No. 14692e:

> "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime and no witnesses may be compelled to furnish any one of them against himself."

A defendant cannot be compelled to give testimony against himself unless the compelled testimony and its fruits cannot be used, in any manner, by federal officials in connection with a criminal prosecution of that defendant. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964).

As is evident from the factual pattern present at Petitioner's sentencing hearing, in testifying about any and all matters touching upon the Banque Worms account and Broadview Development, Petitioner would have been compelled to give testimony which realistically would most likely be used against him to demonstrate possible money laundering and/or tax evasion.

The Fifth Amendment protects a witness or defendant reasonably who reasonably apprehends could be used in a

criminal prosecution or that could lead to other evidence that may be used. *Application of Gault*, 387 U.S. 1, 12 L.Ed.2d 527, 87 S.Ct. 1428 (1967).

The testimony of Petitioner's Probation Officer establishing the jaundiced view of the IRS Special Agents regarding Petitioner's tax deductions concerning the Broadview property demonstrates the reasonableness of Petitioner's Fifth Amendment fears, enhanced no doubt by sound advice of counsel.

This Court has held that the Fifth Amendment privilege applies to a governmental attempt to compel from a defendant evidence of a testimonial or communicative nature. *United States v, Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1296 (1967), and has further held that an individual is not required to aid in the discovery production or authentication of

incriminating evidence . *Andersen v. Maryland*, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

Petitioner suggests that he was subject to the violation of both these principles in his sentencing proceedings. As his counsel case it he was 1.) being invited to waive his Fifth Amendment privilege and 2.) then being penalized for not doing so.

This Court, through an opinion written by our present Chief Justice, has made clear that the test for application of the Fifth Amendment privilege is whether the claimant is confronted by substantial and real, not merely trifling or imaginary hazards of incrimination. *United States v. Apfelbaum*, 445 U.S. 115. 63 L.Ed.2d 250, 100 S.Ct. 948 (1980) quoting *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896).

Petitioner suggests to this Court most respectfully that if his own apprehensions based on advice of counsel did not give the imprimatur of veracity to his concerns, the IRS interest in the matter reflected by the testimony of his Probation Officer certainly did.

The Fifth Amendment is absolute, in prohibitory application in terms of self incrimination and it does not distinguish degrees of incrimination. See: *Rhode Island v. Innis,* 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980).

The Second Circuit, in its Opinion, reasoned "[i]n the first place, Merritt had waived his Fifth Amendment privilege as to information regarding his fund by agreeing, as part of his plea bargain, to disclose all his financial information to the Government and court."

While this may be true in the abstract, it can only be true to the crime to which he pled - 18 U.S.C. §371 conspiracy count. For it is well established in the law and recognized in our circuit courts, including the Second Circuit that while a guilty plea waives the Fifth Amendment privilege for the crime charged, this waiver is to be limited only to the crime in question. *United States v. Gloria,* 494 F.2d 477 (5th Cir. 1974); *Krogmann v. United States,* 225 F.2d 220 (4th Cir. 1965); *United States v. Chase,* 281 F.2d 225 (6th Cir.1960), and *United States v. Miranti,* 253 F.2d 135 (2nd Cir. 1958).

In terms of any possible issue as to whether or not Petitioner had viable and realistic Fifth Amendment claim, *Hoffman v. United States* 341 U.S. 479, 95 L.Ed.2d 1118, 71 S.Ct. 814 (1950) in citing *Feldman v. United States,* 222 U.S. 487

providing for a "liberal construction" of the privilege "in favor of the right it was intended to secure" and citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892) as well as *Arndstein v. McCarthy*, 254 U.S. 71 (1920), clearly establishes that Petitioner's Fifth Amendment concerns were indeed well grounded.

In this regard, it is clear that the privilege extends to answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Blau v. United States*, 340 U.S. 169, 95 L.Ed.2d 170. 71 S.Ct. 223 (1950).

A witness or defendant need only have "reasonable cause to apprehend danger from a direct answer". *Mason v. United States*, 244 U.S. 362, 61 L.Ed. 1198, 37 S.Ct. 621 (1917).

Hoffman, supra, tells us at Pg. 486 that:

> "To sustain the privilege it need only be evident from the implementation of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Petitioner should not only try to bring these issues into the "modern era" of the "guidelines" and demonstrate how the Fifth Amendment applies to sentencing proceedings but should also demonstrate a division of circuit on this same issue, if possible, to obtain relief from this Court.

Petitioner believes this can be done by reference to an acquittal of issue in the Ninth Circuit with a different outcome honoring the privilege. The case is *United States v. Sitton*, 968 F.2d 947 (9th Cir. 1992)

In *Sitton, supra*, the case of *United States v. Ronald Lee Dewbre.* was consolidated for appellate purposes. Dewbre

claimed that at sentencing the district court had improperly denied him a two point reduction for acceptance of responsibility.

Dewbre insisted upon not discussing his case prior to appeal, and an attempt to compel him to do so violated his Fifth Amendment right against self incrimination.

The Ninth Circuit in *Sitton, supra*, agreed with Dewbre and in relying on *United States v. Watt*, 910 F.2d 587, 592 (9th Cir. 1990), determined that "the court may not consider against the defendant any constitutionally protected conduct" (Emphasis added.)

The Ninth Circuit remanded for resentencing because "[w]e are unable to determine whether the denial [of acceptance of responsibility] was consistent with Dewbre's constitutional right."

Petitioner here respectfully suggests that the damage done to him here in the face of his Fifth Amendment right was far more egregious.

Not only was he denied credit, but his exercise of the privilege caused him to be treated by the court as a "missing witness" and he was penalized by severe upward adjustment from the court for the exercise of that right--all of this not in the face of a mere "prior to appeal" problem such as in *Sitton, supra*, but in the face of a very real concern that his testimony would lead to money laundering and tax evasion charges.

CONCLUSION

The mandate of the Fifth Amendment is clear - one cannot be compelled to incriminate himself as to crimes with which he has yet to be charged (and thus provide a "link" in the chain for the government to do so) under the guise of complying with terms of a plea agreement relating to the one crime to which he has agreed to plead.

Further, to penalize a defendant, at sentencing, for invoking the above privilege by severely adjusting his sentence upward in the face of his exercised privilege is violative of the Fifth Amendment, as *Sitton, supra*, tells us.

This is precisely what occurred here and is precisely what the Second Circuit failed to grasp when its opinion tells us that no Fifth Amendment violation took place because:

> "...Merritt had waived his Fifth Amendment privilege as to information regarding his funds by agreeing, as part of his plea bargain, to disclose all his financial information to the Government and the court.
>
> Second, while production can sometimes involve an incriminating act of testimonial character [analogy omitted], the same is not true of restitution payments in these circumstances. Money is fungible. The production of funds for restitution for a crime the defendant acknowledges he participated in does not implicitly acknowledge his possession of the stolen funds, especially when the defendant is a substantial businessman, like Merritt, who could be expected to have access to such a sum from sources other than the crime."

This tortured reasoning and rationale ignores the very point Petitioner had urged in his brief to the Second Circuit -- that to make any statement of ownership regarding the Banque Worms and Broadview matters would have, *ipso facto*, opens Petitioner up to charges of tax evasion and money

laundering -- crimes for which he would have incriminated himself by any such testimony.

Judge Martin did not penalize Petitioner because he did not make restitution -- for the Judge could have ordered any restitution he felt proper. Judge Martin penalized Petitioner by a severe upward adjustment for Petitioner's refusal to incriminate himself as to tax evasion and money laundering charges as the trial court record adequately reflects.

As the ghost of John Marshall knows, this egregious violation of the Fifth Amendment privilege, regardless of its semantic clothing, has been prohibited since our Constitution was framed by the Bill of Rights; the acquittal of Aaron Burr is memorialized proof.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 986 -- August Term 1991

(Argued: May 22, 1992 -
Decided: February 9, 1993)

UNITED STATES OF AMERICA,

Appellee,

-against-

MARTYN C. MERRITT,

Defendant-Appellant.

B E F O R E: ELLSWORTH A. VAN GRAAFEILAND, AMALYA L. KEARSE, Circuit Judges, and PIERRE N. LEVAL, District Judge.*

Defendant was convicted, in the United States District for the Southern District of New York, of conspiracy to defraud the United States, and was sentenced by John S. Martin, Jr., J., to a term of imprisonment that included a substantial upward departure from the guideline range. Defendant appeals, contesting the lawfulness and extent of the departure. Affirmed.

JOEL B. RUDIN, New York,
N.Y., for Defendant-Appellant.

BARUCH WEISS, Assistant United States Attorney, New York, N.Y. (Otto G. Obermaier, United States Attorney for the Southern District of New York, and Miguel A. Estrada, Assistant United States Attorney, of counsel) for Appellee.

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*Hon. Pierre N. Leval, District Judge, United States District Court for the Southern District of New York, sitting by designation.

LEVAL, District Judge:

Defendant Martyn C. Merritt appeals from a judgment of conviction and sentence entered on October 10, 1991 in the United States District Court for the Southern District of New York, John s. Martin, Jr., Judge, on his plea of guilty to the charge of conspiracy to defraud the United States, 18 U.S.C. § 371. Merritt was sentenced to the statutory maximum of 60 months imprisonment, three of supervised release, restitution of $936,000, the maximum fine of double the loss ($1,872,000), and a special assessment of $50. In imposing sentence, Judge Martin departed upward from the guideline range, in part because Merritt fraudulently schemed to retain the proceeds of his fraud.

On appeal, Merritt contends that (1) the upward departure was unlawful; (2) the district court impermissibly punished Merritt for relying on his fifth amendment rights in refusing to disgorge the proceeds of the fraud or explain how the funds had been dissipated;

(3) the Government violated its plea agreement with Merritt by advocating upward departure.

We affirm.

I. Background

A. The Offense

The twelve-count indictment arose from a scheme by Merritt and AMG Services, Inc. to defraud the United States Agency for International Development (AID) in connection with a foreign-aid contract to supply and ship high-quality powdered milk to the Democratic Republic of the Sudan, which was facing a serious food shortage. Instead of shipping the powdered milk, Merritt shipped a compound known as "milk replacer," which is not fit for human consumption and is commonly used as animal feed.

In 1985, AID had agreed to provide $71 million in grant aid to the Sudan. The Sudanese government, acing through the Arab Company for Agricultural Production and Processing (ACAPP), allocated approximately $1.25 million of the AID money for the procurement of powdered milk. ACAPP solicited bids for several hundred tons of high-quality, nonfat powdered milk.

ACAPP selected laura Exports USA, a New Jersey corporation, to supply 501 tons of milk power produced in the United States, for approximately $936,000. In July 1988, ACAPP and AID arranged for payment of United States funds to Citibank, upon Laura's delivery to Citibank of proper certification that a supply of milk from the United States had been loaded freight prepaid on an approved vessel for delivery to the Sudan. Laura, however, was unable to find milk at the appropriate price, quality, and quantity in the United States, and, with the permission of ACAPP and AID, modified the agreement to permit shipment of the milk from Sri Lanka.

In December 1988 and January 1989, Laura assigned its rights and obligations under the contract to Merritt's company, AMG Services, Inc., a New York-based shipping and freight-handling company. Under the arrangement, AMG would supply and ship the milk and would receive the funds held by Citibank, net of a small commission for Laura.

On January 10, 1989, Merritt and AMG made a contract to purchase 501 tons of milk powder from a Netherlands corporation, Taco, C, for $666,330. On January 18, 1989, Merritt caused the presentation to Citibank of a fraudulent bill of lading that falsely stated that 501 metric tons of milk had been loaded onto the Dutch ship "Tanya P" in Port Columbo, Sri Lanka. On the basis of the false bill of lading, citibank released the $936,870 payment for the milk. Merritt received the money on January 23, 1989. In fact, he had neither located, nor even acquired, the milk.

Merritt told the probation officer preparing his presentence report:

> I knew that the Citibank letter of credit required the milk powder to come from Sri Lanka. In fact, I knew that the milk powder was not on board any vessel at that time, and I knew that it would not at any time be loaded in Sri Lanka.

Weeks later, Merritt acquired, purchased, and shipped "milk powder replacer" (not milk powder) from

the Netherlands, (not from Sri Lanka). Milk replacer is normally used as animal feed, has a foul taste and odor, and is not fit for human consumption.

Although Merritt claimed to his probation officer that he was not the instigator of the substitution of the animal feed, the Government's evidence showed that he was well aware of it. On March 2, 1989, Merritt sent a fax transmission to a co-conspirator in Sri Lanka stating:

When the milk replacer reached the Sudan on April 6, 1989, ACAPP found that the milk was being held at the dock because the shipper and supplier claimed that they had not been paid. Merritt then sent ACAPP a series of telexes, again designed to conceal the fraud and to lull ACAPP into thinking it could and would soon get the milk released, and that any delay in the release of the milk was not Merritt's fault.

B. The Plea Agreement

Merritt was charged with a twelve count indictment, alleging one count of conspiracy, 18 U.S.C. §

371, one count of defrauding the United States, 18 U.S.C. § 1031, one count of submitting a false claim to the United States, 18 U.S.C. § 287, and nine counts of wire fraud, 18 U.S.C. § 1343. On May 31, 1991, Merritt entered into a plea agreement with the government. Under the agreement, Merritt pled guilty to count one, which charged him with a conspiracy to submit false claims to the United States, to defraud the United States in connection with a contract worth in excess of $1 million, and to commit wire fraud. The court carried a maximum sentence of five years' imprisonment, a maximum fine of the greater of $250,000, or double the gross gain or gross loss, a $50 special assessment, $1,250,000 in restitution to the United States government and three years' supervised release.

In the agreement, the parties stipulated to the following facts and Sentencing Guidelines analysis:

> a. Although the conspiracy count charges that the offense did not end until May 11, 1990, all the overt acts took place

prior to November 1989 and consequently the relevant Guidelines are those that were in effect prior to the November 1989 amendments.

b. Because the offense is one of fraud and deceit, the base offense level is 6, pursuant to § 2F1.1(a).

c. Because the loss to the United States exceeded $1,000,000, the base offense level should be increased by 9 points, pursuant to § 2F1.1(b)(1)(J).

d. Because the offense involved more than minimal planning, the offense level should be increased by another 2 points, pursuant to § 2F1.1(b)(2). This upward adjustment also subsumes any upward adjustment that might be appropriate for Mr. Merritt's role as an organizer, leader, manager or supervisor under § 3B1.1.

e. Neither party will seek a departure from the Guidelines.

Thus, the stipulated base offense level was 17. The parties also stipulated:

> It is understood that the sentence to be imposed upon Mr. Merritt is within the sole discretion of the sentencing Judge. [The United States Attorney's] Office cannot and does not make any promise or representation as to what sentence Mr. Merritt will receive.

Merritt agreed

> to allocute that he believed, prior to shipping the milk product to the Sudan, that the product was animal feed not fit for human consumption, and knew that the contract required the supply of 1% low-fat milk fit for human consumption.

Merritt also agreed to allocute that he knowingly submitted a false bill of lading. Finally, Merritt agreed to make available, prior to sentencing, "all personal and corporate financial information requested by the Government." The Government agreed not to object to dismissal of the remaining counts against Merritt and all counts against AMG Services.

The parties did not agree on whether adjustments were appropriate for acceptance of responsibility or obstruction of justice. Merritt argued that because he was entering a plea of guilty, he was entitled to a two point reduction for acceptance of responsibility under § 3E1.1. The Government, however, stated:

> [T]he government is of the view that because of what it considers Mr. Merritt's

> obstructive conduct after he supplied the low quality milk powder, there should be no reduction of two points for acceptance of responsibility, or, alternatively, that any downward adjustment for acceptance of responsibility should be offset by a corresponding upward adjustment for obstruction pursuant to § 3C1.1, and that consequently the appropriate offense level should be 17. *In arguing for an offense level of 17 as opposed to 15, the Government is free to raise all arguments which, in its view, indicate an absence of acceptance of responsibility, and, in addition, to raise all arguments which support its contention that the defendant engaged in obstruction pursuant to § 3C1.1.*

(Emphasis added.) The parties agreed that

> [i]n the event the Probation Department or the Court contemplates any guidelines Adjustments, enhancements or calculations not referred to above, the parties reserve the right to make all appropriate arguments concerning such calculations, so long as such arguments are consistent with the terms of this agreement, including the understanding that the offense level range is 15 to 17.

C. The Plea Allocution and Evidentiary Hearing

Merritt violated his promise under the plea agreement to make available prior to sentencing all

personal and corporate financial information requested by the Government. During his plea allocution, Merritt stated falsely that of the $936,000 he received, all but approximately $75,000 was disbursed to other parties. Merritt submitted a forged document purporting to be an acknowledgement by the supplier of payment. The supplier later submitted an affidavit asserting that it had never received payment and had never seen or sent the document Merritt submitted. Merritt also sent a letter to a witness in Europe seeking confirmation of the supplier's payment, on stationery that appeared to be from a government agency.

Merritt told the probation officer that the house at 87 Broadview Ave., New Rochelle, in which he had lived, had been owned by an entity in which he claimed he had no financial interest, the Broadview Development Corporation. The probation officer noted that despite the alleged sale to Broadview, merritt continued to deduct

property taxes and mortgage interest on the property in 1989 (when he purportedly no longer owned the house).

In a submission in anticipation of sentencing, the Government advised the court that after his guilty plea, Merritt had continued to claim he paid Taco with the crime proceeds; Taco denied receiving any payment. Merritt supplied no records documenting any payment to Taco. The Government also submitted additional documents showing that Merritt had misrepresented his interest in the Broadview house. The Government concluded its sentencing memorandum with the statement that Merritt "should be found to have engaged in obstructive conduct and sentenced in accordance with the plea agreement under Guideline Level 17."

At a conference on August 16, 1991, Judge Martin stated:

> there is an effort being made to secrete assets so that restitution cannot be made. It has been my experience that generally defendants who pleaded guilty and were going to find themselves before a court for

> sentencing would do everything in their power to see that what they had done was right. I do not find this here. I am particularly concerned, . . . because I think Mr. Merritt is trying to deceive the court . . . .

Judge Martin then scheduled a hearing regarding the ownership of Broadview Development Corporation and the distribution of the proceeds of the fraud. As to the gross receipts from the fraud, Judge Martin stated: "It was in his hands. He had control over it. Absent some showing as to where that money went, my view is he is responsible." Judge Martin explained:

> . . . the burden is on Mr. Merritt to establish that those funds went somewhere other than to his use. . . .
>
> [O]nce the Government puts the money in Mr. Merritt's hands and shows what analysis of his accounts demonstrates, then the burden is on him to prove that that money went for the purposes that he said it did. . . .

Judge Martin also advised that an upward departure for harm to the public health may be appropriate, as the fraud involved Merritt's provision of "material unfit for

human consumption" to a "nutrition program." Judge Martin advised the defendant that he was considering an upward departure up to the statutory maximum of five years. Judge Martin stated:

> One of the reasons I want to put this off as long as I am putting it off is because I want Mr. Merritt to understand that . . . if there is an opportunity to get this money back, I want it back, and he will be given credit for it; but if I find as a matter of fact that there has been an effort on Mr. Merritt's behalf to secrete funds, he should understand he is getting the maximum that I can possibly impose.

At an extensive hearing on September 26, 1991, the Government presented to the court a collection of documents regarding the distribution of proceeds of Merritt's fraud and the proceeds of the sale of Merritt's house. The Government submitted an affidavit of a Mr. van der Beld, a Taco employee responsible for this transaction, and a computer printout from Merritt's business showing that Merritt had not paid Taco for the purchase of the milk replacer.

The Government also presented a bank statement from Chemical Bank stating that AMG Services' account had been credited for payment of $936,870 from Citibank; a letter from Mrs. Merritt directing Chemical Bank to transfer $900,000 of that amount to an account held by Xanthus Corporation, at Exchange National Bank of Chicago; and a bank statement showing that the $900,000 was in fact deposited on January 24, 1989. The Government showed that the Merritts were the authorized signators for the Xanthus accounts. On behalf of Xanthus, the Exchange National Bank purchased $900,000 in commercial paper. The money was then split into two different pots -- one of approximately $670,000, the other of approximately $230,000. The sum of $230,000 was deposited into a Xanthus account at Exchange National Bank. Subsequently, about $670,000 was deposited into a Xanthus account at Exchange National Bank and was then transferred to an account at Banque Worms in

London. The parties disputed who controlled the Banque Worms account.

In addition, the Government presented evidence that Merritt lied to the probation officer about Broadview Development Corporation, and that the corporation was a nominee for Merritt (its records were signed by his wife and mother-in-law.) After purportedly selling the house to the corporation in 1982, the Merritts continued to live there until 1990, when, soon after the investigation began, Broadview sold the property. The Government showed that Merritt concealed at least $271,664 of the sale proceeds by transferring the money to a bank account in the Isle of Jersey.

Judge Martin stated that there were "other questions as to whether or not it is a ground for upward departure, that in this situation, where money is being provided in order to provide foodstuffs to human beings living in Sudan, the court should depart upward because the product that wa supplied was not fit for human

consumption and, therefore, the people in that country were deprived. It was not that they were poisoned, it was that they were deprived of food that they needed."

At the end of the hearing, Judge Martin reiterated to Merritt that he was considering an upward departure and offered Merritt the opportunity to withdraw his plea. Merritt declined to withdraw the plea.

D. Judge Martin's Findings of Fact & Conclusions of Law'

On October 8, 1991, Judge Martin issued preliminary findings of fact and conclusions of law. First, he found that the Government had not violated the plea agreement by participating in the hearing at the court's direction. He noted that the plea agreement specifically recognized that the Government would be free to submit all evidence and arguments indicating an absence of acceptance of responsibility and obstruction of justice by the defendant. Judge Martin reasoned:

> Nothing could be more relevant on the issue of acceptance of responsibility than

> evidence that the defendant was attempting to secrete assets necessary to make restitution of the amount he received by fraud.

Judge Martin made several other findings: that Merritt "engaged in obstruction of justice when he submitted a false document to the Government, to wit, the alleged fax confirming that Taco had been paid for the replacer, and when he attempted to obtain by use of the maritime Service Bureau letter a false statement that the payment had been made"; that Merritt continued to control $670,000 of the proceeds, which he was attempting to hide to avoid being compelled to pay restitution; that Merritt "deliberately attempted to mislead the Probation Department concerning Broadview and provided false and fraudulent information to the Probation Department concerning his financial condition by not reflecting the proceeds that Broadview received from the sale of the house."

The court held that a two point increase for obstruction of justice would be warranted on the ground that Merritt's false claim that Taco had been paid was an attempt to obstruct the Government's investigation. The court held that Merritt should be denied a two point reduction for acceptance of responsibility on two grounds: First, that Merritt falsely stated to the court that he had not retained the $936,000 proceeds; and second, that Merritt continued to insist that the fraudulent document he submitted (the alleged van der Beld letter) was genuine.

Judge Martin concluded that an upward departure may be warranted because several factors are present in this case "'of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'" Manual, § K2.0 (Policy Statement) (quoting 18 U.S.C. § 553(b)). Judge Martin stated three concerns: (1) the extent of Merritt's obstruction of justice; (2) damage to the public welfare

and serious disruption of a governmental function; and (3) engaging in a continuing fraudulent scheme to profit from his crime and retaining the proceeds of his crime. Judge Martin noted that these were not binding conclusions, but were provided to counsel for both sides in anticipation of the sentencing proceedings on October 10.

On October 10, Judge Martin held an additional evidentiary hearing and heard argument regarding upward departure. Judge Martin emphasized that Merritt's obstruction of justice had continued well after his plea of guilty. Judge Martin noted that Merritt had defrauded AID and participated in a conspiracy to deliver "goods not fit for human consumption pursuant to a program to supply foodstuffs, needed foodstuffs, to the Sudan." Judge Martin also suggested that the court would be willing to delay sentencing for four months to provide Merritt with the opportunity to return the proceeds. The defendant declined.

Judge Martin held that the appropriate offense level was 16.[1] He made an upward adjustment of two points for Merritt's obstruction of justice. Judge Martin departed upward one point for danger to public health (Section 5K2.14) (Policy Statement) and disruption of a governmental function (Section 5K2.7) (Policy Statement). Finally, pursuant to Section 5K2.0, he departed upward from the offense level of 19 (30 to 37 months) to the statutory maximum of 60 months imprisonment because of Merritt's continued fraudulent scheme to retain the proceeds of his crime.

II. Discussion

A. Lawfulness of Upward Departure

Merritt contends that the district court had no authority to depart upward from the Guideline sentencing range by reason of Merritt's failure to pay restitution and

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[1]The government conceded that the loss to the United States had not exceeded $1 million, so that Merritt's base offense level was appropriately adjusted downward one point from 17, pursuant to the fraud guideline, § 2F1.1(b)(1).

concealment of assets. Merritt relies on the fundamental statutory command of Section 3555(b) that "[t]he court shall impose a sentence of the kind, and within the range, . . . [set forth in the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. Section 3555(b). Merritt argues that failure to make restitution and concealment of assets ha been adequately considered by the Commission because they are mentioned and assigned potential consequences in several rules and comments relating to fraud, restitution, and fines. He contends that because the Manual adequately considers these issues, they cannot be used to justify departure.

Although we accept Merritt's general approach to the question, we reject the conclusion he suggests. It depends on a far too narrow concept of the appropriate

role of departure. A close examination of the authorizing statute, the guidelines texts, and their inter-relationship, shows that exercise of the departure power, in appropriate circumstances, is an essential ingredient of the sentencing system. We agree with the defendant that the crucial inquiry is whether the factor assertedly justifying departure was "an aggravating or mitigating circumstance of a kind, or to a degree," not adequately taken into consideration by the Sentencing Commission. The first focus of inquiry is then to determine exactly what was it that led Judge Martin to depart, and then to consider how such aggravating circumstances are treated in the Manual in order to determine whether they were "of a kind, or to a degree" adequately considered by the Commission.

The considerations that motivate the upward departure were as follows: The defendant, having obtained nearly $1 million through a fraud scheme, concealed the large proceeds through a series of disguised international corporate and bank transactions; even after

his guilty plea, the defendant engaged in an elaborate scheme, which included falsely claiming to have paid for the merchandise, fraudulently concealing his ownership of real property, and falsely claiming to be no longer in possession of the benefits of the fraud, with the result that, after service of a modest period of imprisonment, he would enjoy the remainder of his life cushioned by the concealed million dollar fraud proceeds. Thus, the aggravating factor was not merely that the defendant had not paid restitution -- a circumstance that can apply to a defendant who, in spite of good intentions, is incapable of doing so, nor merely that the defendant had concealed assets to make himself appear less wealthy. This defendant had devised an elaborate fraudulent scheme designed to protect him from fines, restitution orders, and civil suits as well, so as to secure ultimately the full benefit of his crime. Thus, the factors motivating Judge Martin included the defendant's continuing dishonesty and

greed, and his cynical determination to profit from his crime after service of his jail time.

We turn to explore whether such aggravating circumstances can be the basis of departure.

1. The Statutory Framework

A recent thoughtful article by Professor Daniel J. Freed of the Yale Law School stresses the importance of analyzing the Guidelines in light of the statutory scheme of the Sentencing reform Act, which established the framework for the Guidelines.[2] See Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences, 101 Yale L.J. 1681, 1700, 1730-31 (1992). In the Sentencing Reform Act, Congress insisted that the character of the defendant be a significant factor in the determination of

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[2]Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987b (1984) (codified as amended at 18 U.S.C. §§551-3559, 3561-3566, 3571-3574, 3581-3586 & 28 U.S.C. §§ 991-998).

the appropriate sentence. See United States v. Rodriguez, 724 F.Supp. 1118 (S.D.N.Y. 1989).

The keystone section in the creation of the new sentencing system is 18 U.S.C. § 3553. Subparagraph (a) instructs the sentencing court as to the "[f]actors to be considered in imposing sentence." Most prominently listed in clause (1) are "the nature and circumstances of the offense and the history and characteristics of the defendant." (Emphasis added.) Clause (2) insists on the "need for the sentence imposed" to be "just," and to "protect the public from further crimes of the defendant" -- strongly implying a need to treat defendants differently depending on their perceived likelihood of recidivism. Clause (4), referring to the mandatory consideration of the "guidelines that are issued by the Sentencing Commission," specifies that the types of sentences and ranges will be "established for the applicable category of offense committed by the applicable category of

defendant." 18 U.S.C. § 3553(a)(1), (2), (4) (emphasis added).

The importance of character of the defendant is similarly emphasized in the provisions of the Sentencing Reform Act that established the Sentencing Commission. In defining the duty of the Commission, Congress provided that the Guidelines shall establish a sentencing range "for each category of offense involving each category of defendant." 28 U.S.C. § 994(b)(1) (emphasis added). And Sections 994(c) and (d) instruct the Commission how to proceed in "establishing categories of defendants." 28 U.S.C. §§ 994(c) and (d). Congress directed the Commission to ensure that the Guidelines were drafted in conformity with the Congressionally-enumerated goals of sentencing. See 28 U.S.C. § 994(a) (Commission shall promulgate Guidelines "consistent with all pertinent provisions of this title [28] and title 18"); 28 U.S.C. § 994(f) (Guidelines "shall promote the purposes set forth in section 991(b)(1). . . ."); 28 U.S.C. § 994(g)

(Guidelines "to meet the purposes of sentencing as set forth in section 3553(a) of title 18. . . .").

Thus, contrary to widely held belief, the Sentencing Reform Act did not abolish consideration of the character of the defendant in sentencing. In fact, through the provisions noted above, the Act clearly ordered that the characteristics of the defendant were to be a central consideration in the fashioning of a just sentence.

It is widely, but incorrectly believed that the Act sought to avoid all sentence disparities among defendants with similar records who have been found guilty of similar conduct. What Congress sought to eliminate was "unwarranted sentence disparities." 18 U.S.C. § 3553(a)(6) (emphasis added). Disparities resulting from important character differences are not only warranted. bit clearly envisioned by the provisions of the Act.[3] See 28 U.S.C.

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[3]The Senate Report to the Sentencing Act states that the purpose of the Guidelines "is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences..." S.

§ 991(b)(1)(B) (Guidelines were designed to assist Courts in "avoiding unwarranted sentencing disparities . . . while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . .") (emphasis added); see also Freed, supra, at 1705.

2. The Guidelines

The next inquiry is to determine, with particular reference to the considerations that led Judge Martin to depart upward, how the Guidelines have carried out the statutory mandate described above.

It is particularly instructive to observe the manner in which the Commission carried out the Congressional command to devise a sentencing scheme driven jointly by appraisal of the nature of the offense and of the nature of the defendant.

Rep. No. 225, 98th Cong., 2d Sess. 52, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3235.

Chapter 2, creating categories of offense conduct, consumes over 200 pages of elaborate tables, specifying basic conduct values, with innumerable upward and downward adjustments, depending on the refinements of the details of the criminal conduct. This chapter issues several hundred commands assigning numerical value to the various aspects of the criminal conduct.

The contact between this highly detailed categorization of offense conduct and the treatment of the character of the defendant could scarcely be more marked. For, as to defendant characteristics, the Guidelines contain virtually no categorizing instructions. Explicit guideline commands are limited to those in Chapter 4, relating to the defendant's convictions. In addition, the Manual specifies (albeit in Policy Statements) that race, sex, national origin, creed, religion, and socio-economic status are "not relevant" and that "drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." §§ 5H1.10

(Policy Statement) and 5H1.4 (Policy Statement). Otherwise, the Manual contains no categorizing command or classification pertaining to the character of the defendant.[4] As to all other aspects of a defendant's character, the Commission chose to proceed through commentary, directed to the courts' exercise of discretion. This guidance is given in Policy Statements, Application Notes, Commentary, and the broad discussion of departure that is set forth in the Introduction to the Manual.

For example, in Part 5H, as to age, education and vocational skills, mental and emotional condition, physical condition, employment record, and community and family ties and responsibilities, the Manual's guidance is limited to Policy Statements to the effect that these considerations

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[4]One category only, criminal livelihood under § 4B1.3, turns on the court's finding as to the defendant's "pattern" of criminal conduct, rather than on convictions. But as this section provides only for an increase to Level 13, it is of no consequence except for defendants whose crime of conviction is among the least serious.

"are not ordinarily relevant in determining whether a sentence should be outside the Guidelines." (Emphasis added). No mention whatsoever is made of personal characteristics like kindness or cruelty, generosity or greed, candor or dishonesty, forthrightness or manipulativeness.

These Policy Statements are of vastly different effect from a Guideline. In the first place, Policy Statements are merely hortatory or explanatory, rather than imperative. See United States v. Johnson, 964 F.2d 124, 127 (2d Cir. 1992). Policy Statements are not subject to formal legislative review and are not promulgated in compliance with the provisions of the Administrative Procedure Act, and, accordingly, they do not have the same degree of lawful authority as a Guideline. See id.; see also Freed, supra, at 1695 & 1732.[5] Second, unlike

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[5]Williams v. United States, 112 S.Ct. 1112 (1992) is not to the contrary. The district court had been influenced in its upward departure by an incorrect interpretation of a policy statement allowing departure if the criminal history category inadequately reflects the

the Policy Statements on race or religion, for example, those noted above on age, education, family responsibilities, etc., do not assert categorically that the specified factors are "not relevant." The Manual does not assign them a zero value. These Policy Statements rather assert that such factors "ordinarily" are not relevant in determining whether a sentence should be outside the Guidelines." (Emphasis added). This formulation carries the necessary inference that in cases falling outside the

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defendant's past criminal conduct. Manual, § 4A1.3 (Policy Statement). (The district court had relied on a provision of the policy statement allowing the district court to consider "prior similar adult criminal conduct not resulting in a criminal conviction," § 4A1.3(e), but had failed to determine that the information regarding such conduct was "reliable," as the policy statement required.)

The Supreme Court held that it is error to misinterpret a policy statement that the court relies on in its sentencing determination. Although there is some discussion in both the majority and the dissent about the distinctions and similarities between policy statements and guidelines, nothing in the case turns on these issues. The majority's ruling that it is error to be influenced in sentencing by a misreading of a policy statement in no way implies that policy statements have the same force as guidelines. See Johnson, 964 A.2d at 127; see also Freed, supra, at 1731, n.255.

"ordinary," such factors may be considered as a basis for departure from the guideline range.

The inference is strongly supported by other provisions of the Manual, starting with the basic Application Instructions of § 1B1.1. This section lists nine essential steps for the court to follow in imposing sentence. The final step is to consider offender characteristics, together with all pertinent policy statements and commentary, to determine whether departure is warranted. Section 1.B1.4, furthermore, underlines that in considering "whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."[6]

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[6]This application principle is compelled by 18 U.S.C. § 3661, which states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Finally, in the discussion of Departures in Part 4(b) of the Introduction, the Commission asserts that courts should treat each guideline as "carving out a 'heartland,' a set of typical cases" and that, [w]hen a court finds an atypical case," that "significantly differs from the norm, the court may consider whether a departure is warranted." See, e.g., United States v. Rogers, 972 F.2d 489, 493 (2d Cir. 1992). This discussion goes on to assert that (apart from a few enumerated factors that may not serve as a ground for departure), "the Commission does not intend to limit the kind of factors, whether or not mentioned anywhere else in the Guidelines, that could constitute grounds for departure in an unusual case." Manual, Ch.1, Pt. A, intro. comment 4(b) (Policy Statement). By way of explanation of the need for departures, the Commission stresses the difficulty of prescribing "a single set of guidelines that encompass the vast range of human conduct potentially relevant to a sentencing decision." Id.

To be sure, the ensuing discussion makes clear that the Commission expects the departure power to be sparingly sued, and reserved for unusual cases. At the same time, however, the overall treatment makes clear that departure in the appropriate case is essential to the satisfactory functioning of the sentencing system. See Freed, supra, at 1694.

Thus, the nearly total absence of categorization of offender characteristics to be found in the Guidelines does not mean that the Commission sought to overrule or disregard Congress' instruction that offender characteristics should play a role of major significance in the determination of sentence. It is highly doubtful whether the Commission would have the authority to disregard a so clearly uttered statutory command.[7] Rather, the absence of Guideline commands for defendant characteristics represents the Commission wise

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[7]See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

judgment that it is far more difficult to quantify the effect that such characteristics should have on individual sentences, than it is to prescribe relative values to a variety of offenses. The Commission thus decided (i) that only in circumstances that are other than "ordinary" should such values affect the sentence, but (ii) that in such cases, the degree of impact on the sentence should be governed by reasonable discretionary departure, rather than by prescribed imperative Guideline calculations.

This court has increasingly recognized the importance of departure by reason of offender characteristics for the fair fulfillment of the sentencing scheme prescribed by the Sentencing Reform Act and the Sentencing Guidelines. For example, during the last year alone, we have asserted the appropriateness of departure by reason of extraordinary family circumstances, United States v. Johnson, 964 F.2d 124, 128 (2d Cir. 1992); United States v. Califano, 978 F.2d 65 (2d Cir. 1992) (per curiam), defendant's unusual efforts at drug rehabilitation,

United States v. Maier, 975 F.2d 944, 948 (2d Cir. 1992); United States v. Cotto, 979 F.2d 921 (2d Cir. 1992), previous convictions for aggravated felonies, United States v. Campbell, 967 F.2d, 20, 24 (2d Cir. 1992), voluntary surrender and extraordinary acceptance of responsibility, United States v. Rogers, 972 F.2d 489, 493 (2d Cir. 1992), abuse of defendant by her husband, United States v. Mickens, 977 F.2d 69, 73 (2d Cir. 1992), retention of crime proceeds, United States v. Bryser, 954 F.2d 79, 89 (2d Cir.), cert. denied, 1112 S.Ct. 2939 (1992). And, in United States v. Concepcion, Nos. 91-1151, etc., slip op. 7877, at 7903-11 (2d Cir. Dec. 28, 1992), where the relevant conduct guidelines would require an extraordinary increase in sentence by reason of conduct which defendant was acquitted by jury, we authorized a downward departure. Indeed, in a number of these cases, we have found it necessary to remand guideline sentences for reconsideration because sentencing judges had failed

to appreciate the authority to depart. See, e.g. Rogers, Califano, Mickens, Cotto, and Concepcion, supra.[8]

3. Adequacy of Guideline Consideration of the Factors that led Judge Martin to Depart

Merritt contends that because failure to pay restitution and concealment of assets receive consideration in the Manual, a court is barred from upward departure on those grounds.

It is true that the Manual gives some explicit consideration to those issues. For example, in determining the fine range and the actual amount of any

[8]Earlier opinions of this court approving the departures include United States v. Gonzalez, 945 F.2d 525, 526-27 (2d Cir. 1991) (vulnerability in prison); United States v. Lara, 905 F.2d 599, 605 (2d Cir. 1990) (same); United States v. Restrepo, 936 F.2d 661, 667 (2d Cir. 1991) (minimal role); United States v. Joyner, 924 F.2d 454, 461 (2d Cir. 1991) (same); United States v. Jagmohan, 909 F.2d 61, 65 (2d Cir. 1990) (lack of sophistication); United States v. Ritchey, 949 F.2d 61, 63 (2d Cir. 1991) single aberrant act); United States v. Skinner, 946 F.2d 176, 179-80 (2d Cir. 1991) (atypical conduct); United States v. Garcia, 926 F.2d 125, 127-28 (2d Cir. 1991) (defendant's cooperation conserved judicial resources).

fine to be imposed, the sentencing judge is directed to take into account restitution that the defendant has made or that has been ordered. See Manual §§ 5E1.2(c)(1)(B) & (d)(4). an Application Note identifies "voluntary payment of restitution prior to adjudication of guilt" as relevant to a determination whether the defendant should receive a 2-level reduction for Acceptance of Responsibility. Manual § 3E1.1, Application Note 1(b). And, as to concealment of assets, an Application Note to the fine provision suggests that fines be increased or an upward adjustment be imposed for obstruction of justice where a defendant has tried to hide his assets from the court. Manual § 5D1.2, Application Note 6.

We reject Merritt's argument that these provisions marked the limits of sentencing discretion in his case. As noted above, Judge Martin's overall discussion of the issue made clear that the departure was attributable to conduct and characteristics that went well beyond simple "failure to pay voluntary restitution" and "concealment of assets."

It is clear that Merritt's profound corruption and dishonesty, and his elaborate fraudulent manipulation -- even after his guilty plea -- designed to preserve the huge benefits of his crime after service of jail time, are not "of a kind, or to a degree," adequately considered by the scattered guideline provisions and commentaries that Merritt cites.[9] See United States v. Bryser, 954 F.2d at 89 ("the Guidelines do not adequately consider defendant[']s . .. willing[ness] to exchange time in prison for instant riches upon release"); See also United States v. Valle,

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[9]It is arguable that even for the ordinary case, the Manual does not give adequate consideration to the issue of failure to pay restitution. There is no evidence in the Manual that the Commission believed it had dealt conclusively with this issue and assigned governing values to it. While Chapter 3 does address directly and attach value to a variety of special victim-related adjustment, e.g., "vulnerable" victims (add 2 levels), "official" victims (add 3 levels), victims "physically restrained" (add 2), persons recklessly endangered in course of flight (add 2), no such consideration has been given to failure to pay restitution. It appears merely in commentary as a factor that can be helpful in deciding other issues. The Manual neither vests this factor with any specified value, nor implies that its consideration of the factor has exhausted its significance.

929 F.2d 629, 631 (11th Cir.) (per curiam) (upward departure to statutory maximum for retention of proceeds in "willful, continuing scheme to profit from their illegal activity"), cert. denied, 112 S.Ct. 401 (1991).[10]

Both the statute and Manual make clear that consideration of a factor by the Commission does not bar departure. As the Manual itself states, "the court may depart from the guidelines, even though the reason for the departure is taken into consideration in the guidelines . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." Manual § 5K2.0 (Policy Statement); see also Introduction § 4(b) ("With . . . specific exceptions,

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[10]In United States v. Arjoon, 964 F.2d 167 (2d Cir. 1992), we held that the Commission had adequately considered ordinary restitution prior to adjudication of guilt as a mitigating circumstance warranting a two-point reduction under Section 3E1.1, Application Note 1(b) for acceptance of responsibility. That case has little bearing on the question of whether the Commission adequately considered an out-of-the-ordinary, ongoing scheme fraudulently to retain criminal proceeds as an aggravating factor to be considered at sentencing.

however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." (emphasis added). Professor Freed explains, under the Sentencing reform Act, "judicial review of a guideline's applicability is a matter of paramount importance. Review is not limited to determining whether the Commission merely 'considered' -- i.e., mentioned -- a subject. Rather, the test focuses on the adequacy of the consideration." Freed, supra, at 1699.

We conclude that Judge Martin departed for reasons of conduct and character that were present of a kind and to a degree not adequately considered by the Sentencing Commission's Guidelines, and that the departure was therefore lawful. 18 U.S.C. § 3553(b).

B. The Extent of the Departure

Merritt next contends that even if departure was lawful, Judge Martin's upward departure from 37 months

to 60 months, equivalent to a five level increase, was beyond his discretionary power.

Merritt contends that his conduct found by Judge Martin was akin to obstruction of justice, and, therefore, like obstruction of justice under Guidelines § 3C1.1, merited at most a two level increase. Merritt contends further that Judge Martin violated the rule of United States v. Kim, 896 F.2d 678, 685 (2d Cir. 1990), that, in departing upward "the judge should consider the next higher levels in sequence to determine if they adequately reflect the seriousness of the defendant's conduct."

Merritt misconceives the meaning of the Kim opinion. As explained in United States v. Rodriguez, 968 F.2d 130, 140 (2d Cir.), cert. denied, 113 S.Ct. 140 (1992), Kim does not require that an offense-level departure be accompanied by a "mechanical level-by-level review of the extent of the upward departure . . . ." Rather, "[t]he point of Kim is to use the multi-count analysis and the sentencing table as useful guidance in determining the

extent of the departure, not to precipitate a time-consuming analysis of every possible calculation of arguably relevant circumstances." United States v. Baez, 944 F.2d 88, 89 (2d Cir. 1991). What Kim requires is a "careful explanation in the record of the reasons for the extent of the departure." United States v. Campbell, 967 F.2d 20, 26 (2d Cir. 1992); see also, 18 U.S.C. § 3553(c). Judge Martin complied with the governing standard.

The standard for appellate review of a sentence that departs from the Guidelines is whether such sentence is "unreasonable." By statute, reasonableness is to be judged in the light of "the factors to be considered in imposing a sentence, as set forth in [18 U.S.C. § 3553(a)] . . . and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) . . . ." 18 U.S.C. § 3742(e)(3); see United States v. Maier, 975 F.2d at 949; accord Williams v. United States, ___ U.S. ___, 112 S.Ct.

1112, 1121 (1992); United States v. Campbell, 967 F.2d at 26.

We conclude that the upward departure was altogether reasonable. It responded to the sentencing objectives prescribed in 18 U.S.C. § 3553(a). Given the defendant character discussed above, the departure was necessary "to provide just punishment . . . ." 18 U.S.C. § 3553(a)(2)(B). Had the judge not resorted to an extensive upward departure, Merritt would have provided an example of a defendant who beat the system, relying on the Guidelines to limit his jail time while securing lifetime enjoyment of a fraudulently obtained million dollars. See generally Freed, supra, at 1708-10 (discussing judge's duty to consider purposes of sentencing).

As to Merritt's argument that the upward departure should have been limited to two levels because his conduct resembled obstruction of justice, we reject it. The argument rests on a proposition that is well-conceived, but wrongly applied to this case. Merritt is

correct that if Judge Martin had departed upward because the defendant's conduct strongly resembled "obstruction of justice" as defined under the Guidelines, although not technically within its ambit, then the departure should have been commensurate with the consequences provided by the Guidelines for obstruction of justice, at least unless good justification is furnished for going further. As we stated in Rodriguez, 968 F.2d at 140, "when conduct not taken into account by the Guidelines provisions applicable to the defendant provides the basis for an upward departure, the court should not arrive at a sentence that exceeds the penalty that would have been imposed had the defendant been sentenced under other Guidelines provisions that do take the same or similar conduct into account.[11]

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[11]Because Judge Martin had ample reasons to justify departure up to the limit of the defendant's statutory sentence exposure, he did not consider other available reasons. We note that the crime of substituting animal feed, unfit for human consumption, in place of milk in shipments intended as famine relief to a starving country, is so heinous and goes so far beyond the "heartland" of

C. The Defendant's Fifth Amendment Privilege

Merritt contends that the district court's upward departure violates his Fifth Amendment rights by penalizing him for refusing to incriminate himself by returning the proceeds of his crime. We rejected similar arguments in Bryser, 954 F.2d at 89. Merritt points out that, as of the time instantaneously preceding his sentence, notwithstanding his guilty plea to one county, he had not yet been convicted of this offense and remained open to prosecution on it, not to mention 11 open counts which might yet be the subject of prosecution. In support of his contention, Merritt cites United States v. Stratton, 820 F.2d 562, 564-65 (2d Cir. 1987); United States v. Bahadar, 954 F.2d 821, 824 (2d Cir.), cert. denied, 113 S.Ct. 149 (1992); United States v. Domenech, 476 F.2d

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fraud, which prescribed Merritt's offense level, as to justify the conclusions that the nature of Merritt's offense was not adequately considered under the fraud guidelines. In our view, this consideration would have justified upward departure as far as Judge Martin went, or further, had the statute allowed.

1229, 1231 (2d Cir.), cert. denied, 414 U.S. 840 (1973); and United States v. Oliveras, 905 F.2d 623, 628 (2d Cir. 1990) (per curiam).

Judge Martin's findings and upward departure involved no infringement of Merritt's Fifth Amendment privilege. In the first place, Merritt had waived his Fifth Amendment privilege as to information regarding his funds by agreeing, as part of his plea bargain, to disclose all his financial information to the Government and the court.

Second, while production can sometimes involve a self-incriminating act of testimonial character, especially if the production is of some unique object (a murder weapon or a stolen jewel) and the defendant's production demonstrates his knowledge of, and access to, it, the same is not true of restitution payments in these circumstances. Money is fungible. The production of funds for restitution for a crime the defendant acknowledges he participated in does not implicitly acknowledge his possession of the

stolen funds, especially when the defendant is a substantial businessman, like Merritt, who could be expected to have access to such a sum from sources other than the crime.

Merritt argues further that Judge Martin must have impermissibly relied on his silence as the basis for concluding that the defendant retained the fraud proceeds. There is no merit to this argument. The Government had presented ample evidence to sustain a finding by a preponderance of the evidence with respect to disputed issues at sentencing. See United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989) (government's burden at sentencing is preponderance of evidence), cert. denied, 494 U.S. 1090 (1990). Nor did Judge Martin impermissibly place the burden of proof on the defendant. As Judge Martin clearly stated, it was because the government had proved that the money was in the defendant's hands that the burden of rebutting this evidence fell on the defendant.

D. The Plea Agreement

Finally, Merritt contends that the Government broke its plea agreement with him by advocating an upward departure. Merritt argues that his case is similar to that of United States v. Corsentino, 685 F.2d 48 (2d Cir. 1982), in which we remanded for resentencing because the Government violated its agreement not to take any position on the defendant's request for a more lenient sentence. We disagree. First, the Government was permitted under the agreement to raise any arguments relevant to the disputes about obstruction of justice and acceptance of responsibility. The facts on which Judge Martin relied related to those issues.

Furthermore, it was Judge Martin, not the Government, who initiated and pursued the issue of upward departure. Judge Martin directed the Government to provide him with the pertinent information. This was clearly within his power, and the Government's compliance with the Judge's direction to

provide relevant sentencing information did not involve any violation of its plea agreement. See ,United States v. Williamsburg Check Cashing Corp., 905 F.2d 25, 28 (2d Cir. 1990). The plea agreement expressly recognized that the court could, in any event, consider "any other relevant information." See 18 U.S.C. § 3661.

Moreover, the Government correctly argues that Merritt himself violated the plea agreement by refusing to make available prior to sentencing "all personal and corporate financial information requested by the Government." A defendant may enforce a plea agreement that induces a guilty plea, Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Casamento, 887 F.2d 1141, 1181 (2d Cir. 1989); cert. denied, 493 U.S. 1081 (1990); however, a defendant who materially breaches a plea agreement may not claim its benefits, United States v. Nathan, 476 F.2d 456, 459 (2d Cir.), cert. denied, 414 U.S. 823 (1973); see also United States v. Eucker, 532

F.2d 249, 256 (2d Cir.), cert. denied, 429 U.S. 822 (1976); United States v. Gogarty, 533 F.2d 93, 95 (2d Cir. 1976).

Here, despite his promise in the plea agreement to turn over his financial information, Merritt repeatedly refused to turn over documentary evidence about disposition of the proceeds, and falsely stated that the supplier of the milk replacer had been paid. Merritt also lied to the probation officer about the proceeds of the Broadview sale. Merritt breached material terms of the plea agreement, and would therefore have no proper objection even if the Government had gone beyond what the agreement permitted.

CONCLUSION

We have considered all of Merritt's arguments on this appeal and have found no basis for reversal. The judgment of conviction and the sentence imposed are affirmed.